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CLERK U.S. DISTRICT COURT
CENTRAL DISTRICT OF CALIF.
LOS ANGELES
MAD

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10 LLC and Defendants URBAN NUTRITION and
11 EXCELL

12 **UNITED STATES DISTRICT COURT**
13 **CENTRAL DISTRICT OF CALIFORNIA**

14
15 RAY SAHELIAN, an individual,
16
17 Plaintiff,
18
19 -against-
20 OREXIS LLC, a foreign limited
liability company, URBAN
NUTRITION, and, EXCELL,
Business Forms Unknown,
21 Defendants.

Case No. CV08-03561 RGK (CTx)
**AMENDED ANSWER AND
COUNTERCLAIMS**

22 OREXIS LLC.
23
24 Counterclaimant,
25
26 -against-
27 RAY SAHELIAN, LONGEVITY
RESEARCH, INC., and JOHN
DOES 1-10,
28 Counterclaim-Defendants.

1 Defendants OREXIS LLC, URBAN NUTRITION LLC and EXCELL NOW
2 LLC (incorrectly named in the caption as EXCELL) (collectively "Defendants") by
3 and through their attorneys, Kelley Drye & Warren LLP and Buchalter Nemer,
4 P.C., as and for their Answer to the Complaint of RAY SAHELIAN ("Plaintiff")
5 hereby aver as follows:

6 1. Admit, with respect to Paragraph 1 of the Complaint, that Plaintiff has
7 alleged that this action arises under the Lanham Act, 15. U.S.C. §§ 1051, et seq.,
8 and California law, and that Plaintiff has alleged this Court has subject matter
9 jurisdiction under 28 U.S.C. §§ 1331 and 1338, and supplemental jurisdiction under
10 28 U.S.C. § 1367, but Defendants deny liability for any and all claims asserted by
11 Plaintiff for the reasons stated herein. Except as so admitted, Defendants deny
12 knowledge or information sufficient to form a belief as to the remaining allegations
13 of Paragraph 1 of the Complaint and, therefore, deny same.

14 2. Admit, with respect to Paragraph 2 of the Complaint, that Plaintiff has
15 alleged this Court has Federal Question jurisdiction under 28 U.S.C. §§ 1331, but
16 Defendants deny liability for any and all claims asserted by Plaintiff for the reasons
17 stated herein. Except as so admitted, Defendants deny knowledge or information
18 sufficient to form a belief as to the remaining allegations of Paragraph 1 of the
19 Complaint and, therefore, deny same.

20 3. Admit, with respect to Paragraph 3 of the Complaint, that Plaintiff has
21 alleged that this Court has personal jurisdiction over Defendants, but Defendants
22 deny liability for any and all claims asserted by Plaintiff for the reasons stated
23 herein. Except as so admitted, Defendants deny the remaining allegations of
24 Paragraph 3 of the Complaint.

25 4. Admit, with respect to Paragraph 4 of the Complaint, that Plaintiff has
26 alleged that venue is proper before this Court under 28 U.S.C. § 1391 (b) and (c),
27 but Defendants deny liability for any and all claims asserted by Plaintiff for the
28 reasons stated herein. Except as so admitted, Defendants deny knowledge or

1 information sufficient to form a belief as to the remaining allegations of Paragraph
2 4 of the Complaint and, therefore, deny same.

3 5. Deny each and every allegation found in Paragraph 5 of the
4 Complaint.

5 6. Deny knowledge or information sufficient to form a belief as to the
6 allegations of Paragraph 6 of the Complaint and, therefore, deny same.

7 7. Deny knowledge or information sufficient to form a belief as to the
8 allegations of Paragraph 7 of the Complaint and, therefore, deny same.

9 8. Deny knowledge or information sufficient to form a belief as to the
10 allegations of Paragraph 8 of the Complaint and, therefore, deny same.

11 9. Deny knowledge or information sufficient to form a belief as to the
12 allegations of Paragraph 9 of the Complaint and, therefore, deny same.

13 10. Admit that OREXIS LLC, URBAN NUTRITION LLC and EXCELL
14 NOW LLC are three independent entities operating as limited liability companies,
15 that OREXIS LLC is the owner of the domain name www.orexis.com, and that
16 Defendants operate in New York and New Jersey. Except as so admitted,
17 Defendants deny knowledge or information sufficient to form a belief as to the
18 remaining allegations of Paragraph 10 of the Complaint and, therefore, deny same.

19 11. Deny each and every allegation found in Paragraph 11 of the
20 Complaint.

21 12. Deny the first sentence of Paragraph 12 and admit the remaining
22 allegations of Paragraph 12 of the Complaint.

23 13. Deny each and every allegation found in Paragraph 13 of the
24 Complaint.

25 14. Deny knowledge or information sufficient to form a belief as to the
26 allegations of Paragraph 14 of the Complaint and, therefore, deny same.

27 15. Deny knowledge or information sufficient to form a belief as to the
28 allegations of Paragraph 15 of the Complaint and, therefore, deny same.

17. Deny each and every allegation found in Paragraph 17 of the Complaint.

10 18. Deny each and every allegation found in Paragraph 18 of the
11 Complaint.

COUNT I

15 20. Deny each and every allegation found in Paragraph 20 of the
16 Complaint.

17 21. Deny each and every allegation found in Paragraph 21 of the
18 Complaint.

19 22. Deny each and every allegation found in Paragraph 22 of the
20 Complaint.

COUNT II

24. Deny each and every allegation found in Paragraph 24 of the
Complaint.

26 25. Deny each and every allegation found in Paragraph 25 of the
27 Complaint.

26. Deny each and every allegation found in Paragraph 26 of the Complaint.

27. Deny each and every allegation found in Paragraph 27 of the Complaint. - - - - -

28. Deny each and every allegation found in Paragraph 28 of the Complaint.

COUNT III

29. Repeat, reaffirm and reallege with respect to Paragraph 29 of the Complaint, their answers to Paragraphs 1 through 28 of the Complaint.

30. Deny each and every allegation found in Paragraph 30 of the Complaint.

31. Deny each and every allegation found in Paragraph 31 of the Complaint.

32. Deny each and every allegation found in Paragraph 32 of the Complaint.

33. Deny each and every allegation found in Paragraph 33 of the Complaint.

COUNT IV

34. Repeat, reaffirm and reallege with respect to Paragraph 34 of the Complaint, their answers to Paragraphs 1 through 33 of the Complaint.

35. Deny each and every allegation found in Paragraph 35 of the Complaint.

36. Deny each and every allegation found in Paragraph 36 of the Complaint.

37. Deny each and every allegation found in Paragraph 37 of the Complaint.

38. Deny each and every allegation found in Paragraph 38 of the Complaint.

39. Deny each and every allegation found in Paragraph 39 of the Complaint.

COUNT V

40. Repeat, reaffirm and reallege with respect to Paragraph 40 of the Complaint, their answers to Paragraphs 1 through 39 of the Complaint.

41. Deny each and every allegation found in Paragraph 41 of the Complaint.

42. Deny each and every allegation found in Paragraph 42 of the Complaint.

43. Deny each and every allegation found in Paragraph 43 of the Complaint.

COUNT VI

44. Repeat, reaffirm and reallege with respect to Paragraph 44 of the Complaint, their answers to Paragraphs 1 through 43 of the Complaint.

45. Deny each and every allegation found in Paragraph 45 of the Complaint.

46. Deny each and every allegation found in Paragraph 46 of the Complaint.

47. Deny each and every allegation found in Paragraph 47 of the Complaint.

48. Deny each and every allegation found in Paragraph 48 of the Complaint.

49. Deny each and every allegation found in Paragraph 49 of the Complaint.

COUNT VII [sic]

50. Repeat, reaffirm and reallege with respect to Paragraph 50 of the Complaint, their answers to Paragraphs 1 through 49 of the Complaint.

51. Deny each and every allegation found in Paragraph 51 of the Complaint.

52. Deny each and every allegation found in Paragraph 52 of the Complaint.

53. Deny each and every allegation found in Paragraph 53 of the Complaint.

54. Deny each and every allegation found in Paragraph 54 of the Complaint.

COUNT VIII

55. Repeat, reaffirm and reallege with respect to Paragraph 55 of the Complaint, their answers to Paragraphs 1 through 54 of the Complaint.

56. Deny each and every allegation found in Paragraph 56 of the Complaint.

57. Deny each and every allegation found in Paragraph 57 of the Complaint.

58. Deny each and every allegation found in Paragraph 58 of the Complaint.

59. Deny each and every allegation found in Paragraph 59 of the Complaint.

60. Deny each and every allegation found in Paragraph 60 of the Complaint.

COUNT IX

61. Repeat, reaffirm and reallege with respect to Paragraph 61 of the Complaint, their answers to Paragraphs 1 through 60 of the Complaint.

THE PARTIES

1
2 1. Orexis is a limited liability company organized and existing under the
3 laws of the State of Virginia, with its principal place of business at PO Box 310,
4 Hoboken New Jersey, 07030.

5 2. Counterclaim-Defendant, Sahelian, is, upon information and belief, an
6 individual who resides in Los Angeles, California.

7 3. Counterclaim-Defendant Longevity is a business entity the form of
8 which is unknown to Counterclaimant with a principal place of business at PO Box
9 12619, Marina Del Ray, CA 90295, which is the registrant of the domain name
10 www.raysahelian.com. It is Orexis' contention, upon information and belief, that
11 Longevity is owned or controlled by Sahelian.

12 4. Counterclaim-Defendants John Does 1-10, are business entities or
13 individuals, whose identities are not yet known to Orexis, which have participated,
14 along with Sahelian and Longevity, in the wrongful conduct discussed herein.

JURISDICTION AND VENUE

15
16 5. This is an action for: (i) infringement of a federally registered
17 trademark in violation of Section 32(1) of the Trademark Act of 1946 (15 U.S.C. §
18 1051, et seq., as amended (the "Lanham Act")), 15 U.S.C. § 1114(1); (ii) unfair
19 competition, trademark infringement, and passing off in violation of Section 43(a)
20 of the Lanham Act, 15 U.S.C. § 1125(a); (iii) violations of California Business and
21 Professions Code § 17200; (iv) substantial and related claims of trademark
22 infringement and unfair competition under the common law of the State of
23 California; and (v) cancellation of an invalid registered mark on the Principal
24 Register of the United States Patent and Trademark Office (the "PTO").

25 6. This Court has subject matter jurisdiction over this action under 15
26 U.S.C. § 1121, 28 U.S.C. § 1331, and 28 U.S.C. § 1338(a) and (b), as it involves
27 substantial claims arising under the Lanham Act, and also has supplemental
28

1 jurisdiction under 28 U.S.C. § 1367 over the substantial and related claims under
2 state law.

3 7. Venue is proper in this District under 28 U.S.C. §§ 1391(b) and
4 1391(c) because a substantial part of the acts or omissions giving rise to the claims
5 occurred in this District.

6 FACTS

7 8. For many years, Orexis has been engaged in the sale and distribution
8 of dietary supplements throughout the United States. Orexis' dietary supplements
9 are well-regarded and designed to address sexual health concerns.

10 9. Among the most popular of Orexis' products are those in the OREXIS
11 product line. Since at least as early as October 2003, and long prior to the acts of
12 Counterclaim-Defendants complained of herein, Orexis adopted and used, and has
13 continued to use, the trademark OREXIS on dietary supplements in interstate
14 commerce in the United States, including within this District and throughout the
15 State of California. Since the adoption and first use of the OREXIS trademark on
16 dietary supplements, Orexis has prominently displayed the OREXIS trademark on
17 packaging, advertising, and product literature for the goods, which have been
18 advertised, promoted, offered for sale, and sold in interstate commerce in the
19 United States, including within this District and throughout the State of California.

20 10. Orexis is the owner in the United States of all right, title, and interest
21 in and to the Registration No. 3,232,347 with the PTO for the mark OREXIS for
22 "dietary supplement," which registered on April 24, 2007. A copy of the certificate
23 of registration for the OREXIS trademark is attached hereto as Exhibit A.

24 11. The aforesaid registration is valid and subsisting, unrevoked and
25 uncanceled, and Orexis is the owner of said registration and the trademark shown
26 therein and all of the business and goodwill connected with said trademark in the
27 United States.

28

1 12. The aforesaid registrations have put Counterclaim-Defendants on
2 constructive notice of Orexis' claim of ownership to the OREXIS mark since at
3 least as early as the date of its registration with the PTO.

4 13. Since long prior to the acts of Counterclaim-Defendants complained of
5 herein, Counterclaimant's dietary supplements sold under the OREXIS trademark
6 have been extensively advertised, promoted, distributed, and sold in interstate
7 commerce in the United States. Each year, Counterclaimant expends substantial
8 sums in connection with the advertisement and promotion of OREXIS products.

9 14. As a result of the widespread success and popularity of OREXIS
10 products with the purchasing public, Counterclaimant's intensive advertisement and
11 promotional efforts in support of its OREXIS products, and the excellence of
12 OREXIS products, Counterclaimant has built up an invaluable reputation, goodwill,
13 and fame in the OREXIS trademark in the United States.

14 15. Beginning in 2006, Counterclaim-Defendants used the designation
15 "orexis" in connection with a web page located at the domain name
16 <<raysahelian.com>>. The web page was entitled "Orexis: by Ray Sahelian, M.D.
17 – Deceitful Marketing by Orexis" (the "Sahelian Web Page"). A true and correct
18 copy of the Sahelian Web Page as it appeared on October 17, 2006 is attached
19 hereto as Exhibit B.

20 16. Counterclaim-Defendants' use of the OREXIS name and mark in
21 connection with this page caused the Sahelian Web Page to be listed at or near the
22 top of search results pages when search engine users looked for Orexis and its
23 products.

24 17. Although the Sahelian Web Page has been modified over time and was
25 briefly removed from Sahelian's website, a version of the Sahelian Web Page
26 remains on the Internet today. A true and correct copy of the current version of the
27 Sahelian Web Page is attached hereto as Exhibit C.

18. In addition to operating the Sahelian Web Page, Counterclaim-Defendants, upon information and belief, have purchased keyword advertising on search engines such as Yahoo, Google, and MSN triggered by searches for the mark OREXIS. As a result, an individual who searches for OREXIS on such search engines may receive a webpage which includes links to webpages operated by Counterclaim-Defendants, including the Sahelian Web Page, which contain false statements about Orexis' products and which encourage consumers to purchase Counterclaim-Defendants' products which compete with OREXIS, including his "Passion Rx" products.

19. The Sahelian Web Page either currently contains or has previously contained statements that Orexis "lacks integrity", makes "misleading and deceitful claims", "mislead[s] the public", and "cannot [be] trust[ed]", and in turn, advertises and offers for sale a competing male sexual enhancement product.

20. In addition, Counterclaim-Defendant Sahelian continues to hold himself out as a "doctor in private practice" although his license to practice medicine (MD034596E, issued in Pennsylvania) expired in 1990. Counterclaim-Defendant Sahelian further holds himself out as a practicing physician by stating that "Due to a busy schedule with writing and research [he is] currently not taking new patients." A true and correct copy of a web page operated by Counterclaim-Defendants which makes these representations is attached hereto as Exhibit D.

FIRST CLAIM FOR RELIEF

False and Misleading Advertising In Violation of Section 43(a) of the Lanham Act **(Against All Counterclaim Defendants)**

21. Orexis repeats and realleges each and every allegation contained in paragraphs 1 to 20 of these Counterclaims with the same force and effect as if fully set forth herein.

22. Counterclaim-Defendants mislead consumers in violation of the Lanham Act, 15 U.S.C. § 1125(a), by making false and misleading statements about Sahelian and about products marketed and sold by Counterclaim-Defendants.

23. Counterclaim-Defendants mislead consumers in violation of the Lanham Act, 15 U.S.C. § 1125(a), by making false and misleading statements about Orexis, its products, and its marketing practices.

24. Counterclaim-Defendants' actions have caused and will continue to cause irreparable injury to Orexis unless enjoined by this court.

25. Counterclaim-Defendants' actions have been willful.

26. Counterclaim-Defendants' acts have caused Counterclaimant to suffer damages in an amount to be proven at trial

SECOND CLAIM FOR RELIEF

Trademark Infringement

(Against All Counterclaim-Defendants)

27. Orexis repeats and realleges each and every allegation contained in paragraphs 1 to 26 of these Counterclaims with the same force and effect as if fully set forth herein.

28. Counterclaim-Defendants' unauthorized and willful use of copies, variations, reproductions, simulations or colorable imitations of Orexis' registered mark in connection with the advertising, offering for sale and sale of Counterclaim-Defendants' goods and services, including their use of the OREXIS mark as a trigger for keyword advertising purchased by Counterclaim-Defendants and on websites operated by Counterclaim-Defendants, constitutes use in commerce which infringes Orexis' exclusive rights in its federally-registered marks and is likely to cause confusion, mistake or deception as to the source of the services subject of the keyword advertising offered by Counterclaim-Defendants.

1 29. The aforesaid acts of Counterclaim-Defendants, namely, the
2 unauthorized and willful use of copies, variations, reproductions, simulations or
3 colorable imitations of Orexis' registered mark OREXIS in connection with the
4 advertising, offering for sale and sale of Counterclaim-Defendants' goods and
5 services, constitutes infringement in violation of Section 32(1) of the Lanham Act,
6 15 U.S.C. § 1114(1).

7 30. Counterclaim-Defendants' actions have caused and will continue to
8 cause irreparable injury to Counterclaimant unless enjoined by this court.

9 31. Counterclaim-Defendants' actions have been willful.

10 32. The aforesaid acts of Counterclaim-Defendants have caused damages
11 to Orexis in an amount to be proven at trial.

12 **THIRD CLAIM FOR RELIEF**

13 Unfair Competition

14 (Against All Counterclaim Defendants)

15 33. Counterclaimant repeats and realleges each and every allegation
16 contained in paragraphs 1 to 32 of these Counterclaims with the same force and
17 effect as if fully set forth herein.

18 34. Use by Counterclaim-Defendants of copies, variations, reproductions,
19 simulations or colorable imitations of the Orexis mark with the advertising, offering
20 for sale and sale of Counterclaim-Defendants' goods and services conveys the
21 misleading commercial impression to the public that Counterclaim-Defendants'
22 products, are approved by, sponsored by or are somehow affiliated or connected
23 with Counterclaimant.

24 35. The aforesaid acts of Counterclaim-Defendants, namely, the use of
25 copies, variations, reproductions, simulations or colorable imitations of the Orexis
26 mark in connection with the advertising, offering for sale and sale of Counterclaim-
27 Defendants' goods and services, constitutes a false designation of origin and false
28

1 description and representation, in violation of Section 43(a) of the Lanham Act, 15
2 U.S.C. § 1125(a).

3 36. Counterclaim-Defendants' actions have caused and will continue to
4 cause irreparable injury to Counterclaimant unless enjoined by this court.

5 37. Counterclaim-Defendants' actions have been willful.

6 38. The aforesaid acts of Counterclaim-Defendants have caused damages
7 to Counterclaimant in an amount to be proven at trial.

8 **FOURTH CLAIM FOR RELIEF**

9 California – Bus. and Prof. Code § 17200, et seq.

10 (Against All Counterclaim Defendants)

11 39. Counterclaimant repeats and realleges each and every allegation
12 contained in paragraphs 1 to 38 of these Counterclaims with the same force and
13 effect as if fully set forth herein.

14 40. By reason of their aforesaid acts, Counterclaim-Defendants have
15 engaged in unfair competition in violation of California Business and Professions
16 Code § 17200, et seq.

17 41. Counterclaim-Defendants' actions have caused and will continue to
18 cause irreparable injury to Counterclaimant unless enjoined by this court.

19 **FIFTH CLAIM FOR RELIEF**

20 Common Law Trademark Infringement and Unfair Competition

21 (Against All Counterclaim Defendants)

22 42. Counterclaimant repeats and realleges each and every allegation
23 contained in paragraphs 1 to 41 of these Counterclaims with the same force and
24 effect as if fully set forth herein.

25 43. The aforesaid acts of Counterclaim-Defendants constitute trade name
26 and trademark infringement, and unfair competition in violation of plaintiff's rights
27 under the common law of the State of California.
28

44. Counterclaim-Defendants' actions have caused and will continue to cause irreparable injury to Counterclaimant unless enjoined by this court.

45. Counterclaim-Defendants' actions have been willful.

46. The aforesaid acts of Counterclaim-Defendants have caused damages to Orexis in an amount to be proven at trial.

SIXTH CLAIM FOR RELIEF

Invalidation of a Mark

(Against Sahelian Only)

47. Counterclaimant repeats and realleges each and every allegation contained in paragraphs 1 to 46 of these Counterclaims with the same force and effect as if fully set forth herein.

48. Sahelian has brought suit against Orexis seeking damages for allegedly infringing trademark rights purportedly owned by Sahelian in the mark PASSION RX, including rights in U.S. Trademark Reg. No. 2,935,064 that covers said mark. Orexis has denied any liability for the alleged infringement and contends (among other things) that Sahelian has no enforceable rights in the mark or, at the very least, cannot enforce whatever rights in the purported mark “PASSION RX” he may have against Orexis.

49. Sahelian's trademark registration for the designation "PASSION RX", Registration No. 2,935,064 on the Principal Register of the PTO, for herbal supplements, is invalid and unenforceable because this registered mark is merely descriptive of the goods which are subject of the registration.

50. Registration No. 2,935,064 on the Principal Register of the PTO is subject to order of cancellation from this Court under Section 37 of the Lanham Act, 15 U.S.C. § 1119, which is appropriate and just.

51. Orexis has been and is being damaged by Sahelian's maintenance of Registration No. 2,935,064 on the Principal Register of the PTO.

52. Sahelian's acts have caused Orexis to suffer damages in amount to be proven at trial.

PRAYER FOR RELIEF

WHEREFORE, Counterclaimant prays for judgment against Counterclaim-Defendants, and each of them, jointly and severally, as follows:

1. That Counterclaim-Defendants be required to reimburse Counterclaimant for all actual damages and lost sales suffered by Counterclaimant by reason of Counterclaim-Defendants' illegal conduct, as well as any profits of Counterclaim-Defendants that are attributable to Counterclaim-Defendants' unfair competition and infringement not taken into account in computing the actual damages, and that punitive damages be awarded as authorized under the law;

2. That Counterclaim-Defendants be required to pay all of Counterclaimant's attorneys' fees, expenses and costs associated with this action pursuant to the Lanham Act, 15 U.S.C. §1117;

3. That, based on the deliberate and willful acts of Counterclaim-Defendants, the award to Counterclaimant be increased as provided for under 15 U.S.C. § 1117;

4. That, based on the deliberate an willful acts of Counterclaim-Defendants, Counterclaimant recover its attorneys' fees and costs and disbursements herein;

5. That the Court find that Sahelian's purported mark PASSION RX is merely descriptive, and order the Commissioner of the U.S. Patent and Trademark Office to cancel U.S. Registration No. 2,935,064 pursuant to 15 U.S.C. § 1119; and

6. That Counterclaimant have such further relief as this Court may deem just.

DEMAND FOR A JURY TRIAL

Counterclaimant hereby demands a jury trial on all claims and on all issues triable by a jury.

RESERVATION OF RIGHTS

Defendants'/Counterclaimant's responses to the allegations in the Complaint, as well as their defenses, and counterclaims are based on information that is currently known. Defendants/Counterclaimant reserve the right to amend their responses and/or defenses and/or counterclaims should additional information become known to them.

DATED: October 31, 2008

BUCHALTER NEMER
A Professional Corporation

By: 

JAY R. ZIEGLER
Attorneys for Defendant/Counterclaimant
OREXIS LLC and Defendants URBAN
NUTRITION and EXCELL

EXHIBIT A

Int. Cl.: 5

Prior U.S. Cls.: 6, 18, 44, 46, 51 and 52

Reg. No. 3,232,347

United States Patent and Trademark Office

Registered Apr. 24, 2007

**TRADEMARK
PRINCIPAL REGISTER**

OREXIS

OREXIS, LLC (VIRGINIA LTD LIAB CO)
PO BOX 310
HOBOKEN, NJ 07030

THE MARK CONSISTS OF STANDARD CHAR-
ACTERS WITHOUT CLAIM TO ANY PARTICULAR
FONT, STYLE, SIZE, OR COLOR.

FOR: DIETARY SUPPLEMENT, IN CLASS 5 (U.S.
CLS. 6, 18, 44, 46, 51 AND 52).

SER. NO. 78-359,442, FILED 1-29-2004.

FIRST USE 10-1-2003; IN COMMERCE 10-1-2003.

ASMAT KHAN, EXAMINING ATTORNEY